Supreme Court, U.S.
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NO.

In The

Supreme Court of the United States

October Term, 1996

BENJAMIN BARRY KRAMER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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37 pp

QUESTION PRESENTED FOR REVIEW

WHETHER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT PROTECTS A DEFENDANT AGAINST SUCCESSIVE CONVICTIONS FOR CCE, RICO AND THE TRAVEL ACT BASED UPON THE SAME PREDICATE VIOLATIONS UNDER THE COURT'S LESSER INCLUDED OFFENSE DOCTRINE AND WHETHER THE COURT'S 1993 DECISION IN UNITED STATES V. DIXON HAS OVERRULED GARRETT V. UNITED STATES?

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the following is a list of all parties to the proceedings:

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The City of Bell Gardens, CA
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OPINION BELOW

The January 16, 1996, opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *United States v. Kramer*, 73 F.3d 1067 (11th Cir. 1996). A copy of the decision in *Kramer* is attached hereto as **APPENDIX A.**

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit in *Kramer* was filed on January 16, 1996. The Eleventh Circuit entered its judgment against Petitioner, following the denial of rehearing, on July 18, 1996. *See* **APPENDIX B**. This petition for a writ of certiorari follows within 90 days of the latter date. *See* Supreme Court Rules, Rule 13. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb...." U.S. CONST., AMEND. V.

STATEMENT OF THE CASE

A. Procedural History

On August 26, 1987, a two-count indictment was returned against the Petitioner, BENJAMIN BARRY KRAMER, in the United States District Court for the Southern District of Illinois, charging Kramer and others with conducting a Continuing Criminal Enterprise ("CCE") in violation of 21 U.S.C. § 848(a), and with conspiring to distribute marijuana in violation of 21 U.S.C. § 846. On January 26, 1988, the government returned a superseding indictment, also in the Southern District of Illinois. (R4-177-3.) The superseding

indictment (hereinafter "KRAMER I") included the same two charges but amended the CCE count to charge Kramer under 21 U.S.C. § 848(b), an offense carrying a mandatory sentence of life imprisonment without possibility of parole.

Count 1, the CCE count, charged Kramer with committing a "continuing series" of Title 21 "violations" which included both *substantive* importations, possessions and distributions of marijuana, in violation of 21 U.S.C. §§ 841(a)(1), 952(a), 960, as well as the *conspiracy* to do so, in violation of 21 U.S.C. § 846. The latter "violation" was then separately charged in Count 2. The CCE charge specifically set forth, in subparagraphs (A)-(R), the various substantive Title 21 crimes which constituted, along with the conspiracy charge in Count 2, the "continuing series" of violations. Four of these "violations" are relevant to this Petition:

> E. In or about July 1982, BENJAMIN BARRY KRAMER ... did knowingly and intentionally import into the United States, that is Melbourne, Florida, from a place outside thereof, a controlled substance, that is approximately 15,000 pounds of marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 952(a) and 960(a)(1).

K. In or about March or April 1983, BENJAMIN BARRY KRAMER . . . did knowingly and intentionally import in to the United States, that is New York, New York, from a place outside thereof, a controlled substance, that is approximately 130,000 pounds of marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code 952(a) and 960(a)(1).

M. In or about April 1984, BENJAMIN BARRY KRAMER ... did knowingly and intentionally import into the United States, that is San Francisco, California, from a place outside thereof, a controlled substance, that is approximately 165,000 pounds of marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 952(a) and 960(a)(1).

P. In or about April 1985, BENJAMIN BARRY KRAMER ... did knowingly and intentionally import into the United States, that is New Orleans, Louisiana, from a place outside thereof, a controlled substance, that is approximately 150,000 pounds of marijuana, a Schedule I control-

led substance, in violation of Title 21, United States Code, Section 952(a) and 960(a)(1).

(R4-178-Exhibit B, pp. 2-3.)

While Kramer was under arrest and preventively detained in Illinois on these charges, on November 24, 1987, the government returned another indictment against Kramer (hereinafter "**KRAMER II**") in the United States District Court for the Southern District of Florida. (R4-177-3.) **KRAMER II** charged Kramer with violating and conspiring to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(c) and 1962(d), the Travel Act, 18 U.S.C. § 1952, various tax offenses and a violation of the same subsection of the CCE statute at issue in the original Illinois indictment, 21 U.S.C. § 848(a). (R4-177-3.)

The RICO counts in **KRAMER II** alleged that Kramer had "organized, promoted, managed and supervised [an] 'Enterprise' for the purpose of importing multi-ton loads of marijuana from Colombia, South America, into the United States." (R4-181-A-3) The RICO counts further alleged that Kramer conducted (and agreed to conduct) the illicit "Enterprise" through a pattern of criminal conduct or "racketeering activity" consisting of 46 specific crimes, four of which were identical to the CCE "violations" charged in **KRAMER I**. In particular, Racketeering Act No. 3 charged the same marijuana importation at issue in the Illinois CCE violation (E); Racketeering

Act No. 4 charged the same marijuana importation at issue in the Illinois CCE violation (K); Racketeering Act No. 5 charged the same marijuana importation at issue in the Illinois CCE violation (M); and Racketeering Act No. 6 charged the same marijuana importation at issue in the Illinois CCE violation (P). (*See* R181-A-5-6.)

Similarly, the Travel Act counts alleged that Kramer traveled and made wire transfers with the intent to either promote these same underlying narcotics activities or to distribute the proceeds of these activities. (R181-A-48-49, 51.)

The prosecutors in Florida and Illinois could not agree upon which indictment they preferred to bring to trial first. Kramer indicated that if he was allowed to enter a plea in Florida, he would plead guilty to the entire Florida indictment. (R4-178, Exhibit R, p. 3.) The Illinois prosecutors, however, opposed Kramer's suggestion, acknowledging that if Kramer pleaded guilty to the Florida charges, it "would have the effect of precluding him from being tried in the Southern District of Illinois" because of Double Jeopardy. (R4-178, Exhibit Q, at p. 3.) The Department of Justice eventually intervened and authorized the Illinois indictment to proceed to trial first. (R26-147.)

Accordingly, in June 1988, Kramer went to trial in Illinois on the charges in **KRAMER I**. The primary evidence against Kramer was elicited through the testimony of three witnesses: Charles Podesta, Jeffery Tuchband, and James Blair.

(R8-305; R14-502.) These witnesses gave extensive testimony concerning the four smuggling ventures common to the Illinois and Florida indictments, as set out above. (SR2d-646-4-5.)

On October 4, 1988, Kramer was convicted of both the CCE and conspiracy counts in **KRAMER I**. (R4-177-16.) Immediately thereafter, Kramer renewed his request for an order transferring him to Florida, at least temporarily, so that he could be arraigned. (R4-178, Exhibit T, 984.) The government again objected to any transfer prior to the completion of the Illinois case because of the conceded Double Jeopardy problem: "I think you should impose sentence with respect to his case before he's transferred from this District so that he doesn't enter a plea in some other District and have double jeopardy [sic] bar his conviction here. I think there is a significant possibility of that." (R4-178, Exhibit T, at 9848.) The district court in Illinois agreed with the government and kept Kramer in Illinois. On December 5, 1988, the court sentenced Kramer to a term of life imprisonment without possibility of parole on the CCE charge and to a concurrent term of 40 years imprisonment on the marijuana conspiracy charge. (R4-177-17-18.)

A week after the Illinois sentencing, the government obtained a superseding indictment in Florida, dropping the CCE count against Kramer. (R4-177-18.) Then, on December 14, 1988, over 12½ months after his indictment in Florida, Kramer finally was arraigned on the Florida charges in **KRAMER II**. (R22-6-7.) Kramer subsequently moved to dismiss the

RICO charges in **KRAMER II**, arguing that this second prosecution placed him jeopardy for the same crimes he already stood convicted of having committed in **KRAMER I**. (R22-10; R4-177, 183.) Kramer argued that the narcotics "violations" at issue in the Illinois CCE charge and the Section 846 conspiracy charge in Count 2 of **KRAMER I** were lesser included offenses of the RICO and Travel Act charges in **KRAMER II** and, therefore, barred Kramer's subsequent prosecution for the "greater" offenses of RICO, RICO conspiracy and Travel Act.

On October 12, 1989, Magistrate Judge Lurana Snow filed a Report and Recommendation ("R&R"), recommending that the motion be denied. (R8-316, 317.) A copy of the R&R is attached hereto as **APPENDIX C**. On December 29, 1989, the district court summarily adopted the R&R. (R10-399, 400.)

In January 1990, Kramer went to trial on the charges in **KRAMER II**. During the trial, the government called several of the same witnesses who had testified against Kramer in Illinois, including Charles Podesta, Jeffery Tuchband and James Blair. These witnesses testified about the same marijuana smuggling ventures that were the subject of the CCE charge in **KRAMER I**. (SR2-144; SR3-668; SR6-1080.) On March 28, 1990, the Florida jury returned a general verdict of guilty on all counts at issue in **KRAMER II**. (R13-474.)

On March 30, 1990, at the forfeiture proceeding following the jury's verdict, the district court *sua sponte* invited Kramer to file a post-trial motion addressing the double

jeopardy implications of the earlier prosecution in Illinois. (SR-48-10054.) The court remarked that there was "a lot of congruency" between the cases put on in Florida and Illinois, and that, but for the court having limited the government in an effort to save trial time, the two cases would have been exactly the same. (*Id.* at 10055.) The district court advised that it would hold a hearing on the matter, so that if the double jeopardy claim had merit, it could be granted "before this matter ever goes ... any further." (*Id.* at 10054.)

Pursuant to this invitation from the district court, Kramer filed a post-trial motion, and several supplements thereto, attacking his conviction on Double Jeopardy grounds. (R14-502; SR-646, 657, 668.) However, on August 29, 1990, at Kramer's sentencing the court summarily denied Kramer's post-trial motion. (SR3-691.) The court then sentenced Kramer to a 45 year term of imprisonment. (SR3-698.)

B. The Eleventh Circuit's Decision

Kramer filed a timely notice of appeal to the United States Court of Appeals for the Eleventh Circuit. (SR3-689.) That appeal was consolidated with other appeals from both the criminal case and ancillary forfeiture proceedings. On January 16, 1996, the Eleventh Circuit summarily affirmed Kramer's conviction. *See United States v. Kramer*, 73 F.3d 1067, 1070, n. 1 (11th Cir. 1996). Kramer sought rehearing, which was denied, and the Eleventh Circuit entered its judgment against Kramer on July 18, 1996.

REASON FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT BETWEEN THE COURT'S 1985 DECISION IN GARRETT V. UNITED STATES AND ITS 1993 DECISION IN UNITED STATES V. DIXON CONCERNING THE APPLICATION OF THE BLOCKBURGER DOUBLE JEOPARDY TEST TO COMPLEX "UMBRELLA" CRIMES, SUCH AS CCE, RICO AND THE TRAVEL ACT.

A. General Principles

The Double Jeopardy Clause of the Fifth Amendment affords defendants three basic protections. It protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction and against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). Where successive prosecutions are involved, the Clause serves "a constitutional policy of finality for the defendant's benefit." *United States v. Jorn*, 400 U.S. 470, 479, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971). More importantly, as the Court recognized in *Green v. United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957):

> The underlying idea ... is that the [Government] with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as

> enhancing the possibility that even though innocent he may be found guilty.

Green, 355 U.S. at 187-88, 78 S.Ct. at 223-24.

The Court's Double Jeopardy decisions establish that whether or not the successive prosecution of different statutory offenses violates Double Jeopardy is governed, at least in the first instance, by the test established by the Court in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932) -- *i.e.*, "whether each provision requires proof of an additional fact which the other does not." However, an exception to the *Blockburger* rule also has long been recognized to preclude successive prosecutions for "lesser-included" and "greater" offenses. Thus, when only one offense contains an "extra" element not found in the other, the latter is a lesser included offense of the former and a defendant may not be charged with both in separate proceedings. *See Illinois v. Vitale*, 447 U.S. 410, 421, 100 S.Ct. 2260, 2267, 65 L.Ed.2d 228 (1980); *Brown v. Ohio*, 432 U.S. 161, 168-69, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).

In assessing whether offenses charged in succession are the same or lesser included offenses under *Blockburger*, both the elements of the offenses and the facts underlying them must be analyzed. For example, the Court has recognized that rape and robbery are both lesser included offenses of felony murder, even though felony murder can also be committed through other underlying felonies, such as arson. *See Whalen v. United States*, 445 F.2d 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980);

Harris v. Oklahoma, 433 U.S. 682, 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977) (per curiam). Thus, the general rule is that "where commission of one of *a certain class* of offenses in a necessary prosecution is the factual basis of both, each offense within the class is a 'species of lesser-included offense' in relation to the greater offense." *United States v. 9844 South Titan Court, Unit 9, Littleton, Colorado*, 75 F.3d 1470, 1490 (10th Cir. 1996), quoting *Vitale*, 447 U.S. at 420, 100 S.Ct. at 2267. *Accord United States v. Sampol*, 636 F.2d 621, 652 (D.C. Cir. 1980) ("the prohibition in the Constitution against placing an accused twice in jeopardy 'for the same offense' is directed at the actual 'offense' with which he is charged and not only at the violated statutes").

B. Kramer's CCE Conviction Was a Lesser Included Offense of the Subsequent RICO and Travel Act Charges

In **KRAMER I**, Petitioner was convicted of engaging in a CCE -- an offense the Court has characterized as an inchoate, conspiracy-type offense. *See Rutledge v. United States*, ___ U.S. ___, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996). As with any conspiracy charge, one essential element of a CCE is the existence of a conspiratorial "agreement." However, that is only one element of a CCE. To prove a CCE charge, the government must also establish the existence of a "continuing series" of at least three narcotics violations -- violations which may be both inchoate conspiracies themselves *or* substantive

drug crimes. As previously discussed, in **KRAMER I** the predicate crimes included numerous substantive drug importations, including, although not limited to, violations E, K, M and P, cited above. However, since the jury in **KRAMER I** returned a general verdict, the Court must assume that the jury based this element of the CCE conviction *solely* on predicate violations E, K, M and P. *See Zant v. Stephens*, 462 U.S. 862, 881, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957); *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931).

General verdict principles likewise dictate the proper construction of Petitioner's RICO convictions in **KRAMER II**. The RICO and RICO conspiracy charges required the government to prove that Petitioner committed and agreed to commit a "pattern" of racketeering activity through an enterprise. *See generally United States v. Phillips*, 664 F.2d 971, 1012 (5th Cir. Unit B 1981), *cert. denied*, 459 U.S. 906, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982). While this "pattern," like the felony murder statutes at issue in *Harris* and *Whalen*, may theoretically include a host of crimes, the jury's general verdict requires that the Court assume that the jury found that the "pattern" in this case consisted of only racketeering acts 3, 4, 5 and 6. The same theory applies to the Travel Act counts in **KRAMER II**, since they required the jury to find that Kramer's travels and wire transfers promoted or involved the proceeds of these same predicate drug violations. Hence, under *Brown*, *Harris*, *Whalen*

and *Vitale*, the charges at issue in **KRAMER I** (CCE, its predicate substantive drug importations, and the separate drug conspiracy count), constitute lesser-included offenses of the RICO and Travel Act charges in **KRAMER II**. The RICO and Travel Act charges, prosecuted *after* Kramer was already convicted and sentenced on the CCE and related charges, violated double jeopardy because they constituted the "greater" offenses which subsumed the "lesser" offenses for which Kramer already stood convicted. *See United States v. Kragness*, 830 F.2d 842, 864 (8th Cir. 1987) (since "RICO conspiracy in fact rested upon proof of the drug conspiracies, and not upon proof of an agreement that some other predicate offenses would be committed ... we thus conclude that the offenses are the same under *Blockburger*"). *See also* Brenner, *S.C.A.R.F.A.C.E.: A Speculation on Double Jeopardy and Compound Criminal Liability*, 27 NEW ENG. L. REV. 915, 952 (1993) (hereinafter "BRENNER") (the *Blockburger* "test indicates that RICO/CCE predicates are included offenses for the same reason that predicate felonies are included in felony-murder" in *Whalen*); *United States v. Rivera-Martinez*, 931 F.2d 148, 154 (1st Cir.) (noting, as to CCE predicates, "were we to ... woodenly apply the *Blockburger* test, the argument for double jeopardy would be a powerful one"), *cert. denied*, 502 U.S. 862, 112 S.Ct. 184, 116 L.Ed.2d 145 (1991).

Prior to this Court's decision in *United States v. Dixon*, 509 U.S. 688, 113 S.Ct. 2849, 125 L.E.2d 556 (1993), courts avoided a strict application of the *Blockburger/Whalen* rule in

complex crimes, such as RICO, CCE and the Travel Act, by relying upon statutory intent. Courts examined the legislative history of such statutes and concluded that Congress intended to punish both the complex, umbrella crimes and their predicate offenses. *See United States v. Gonzalez*, 921 F.2d 1530, 1536 (11th Cir.), *cert. denied*, 502 U.S. 860, 112 S.Ct. 178, 116 L.Ed.2d 140 (1991); *United States v. Boldin*, 772 F.2d 719, 729 (11th Cir. 1985), *modified in part on other grounds*, 779 F.2d 618 (11th Cir.), *cert. denied*. 475 U.S. 1048, 106 S.Ct. 1269, 89 L.Ed.2d 577 (1986); *United States v. Walsh*, 700 F.2d 846, 856 (2d Cir.), *cert. denied*, 464 U.S. 825, 104 S.Ct. 96, 78 L.Ed.2d 102 (1983); *United States v. Kragness*, 830 F.2d at 864. As one commentator has noted:

> [T]he courts that ... applied *Blockburger* to CCE/RICO ignored [the lesser-included offense] aspect of the test because it cannot be satisfied: Predicates clearly do not require any proof that is distinct from that needed for a CCE/RICO offense, and, therefore, are lesser included offenses under *Blockburger*.... Federal courts realized that a correct application of *Blockburger* would not allow sequential prosecutions of compound offenses and their predicates, so they distorted the *Blockburger* test to achieve this result.

Brenner, 27 NEW ENG. L. REV. at 956 (1993).

Prior to *Dixon*, the Court circumvented *Blockburger* by characterizing the *Blockburger* test as simply a rule of statutory construction used to divine Congressional intent. *See, e.g.,*

Garrett v. Untied States, 471 U.S. 773, 779, 105 S.Ct. 2407, 2411, 85 L.Ed.2d 764 (1985) (permitting prosecution for CCE following prior conviction for predicate narcotics distribution, in part, because "the *Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history") (citations omitted); *Missouri v. Hunter*, 459 U.S. 359, 368-69, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983) ("[w]here ... a legislature specifically authorizes cumulative punishments under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial"); *United States v. Hawkins*, 658 F.2d 279, 287 (5th Cir. Unit A 1981) (characterizing *Blockburger* test as a rule of construction).

However, in *United States v. Dixon*, 509 U.S. 688, 113 S.Ct. 2849, 125 L.E.2d 556 (1993), this Court held that the *Blockburger* test was neither subservient to legislative intent nor merely a method of divining that intent. Rather, it was the primary test for determining whether the Double Jeopardy Clause itself was violated, regardless of legislative intent. In so ruling, the Court reaffirmed the holdings in *Whalen* and *Harris* and applied them to a defendant's contempt conviction based upon his subsequent commission for a drug offense.

Dixon was arrested for second-degree murder and released on bond, conditioned upon him not committing "any criminal offense." When he was later arrested for possessing

cocaine, the court held him in criminal contempt for violating bond. Thereafter, he was indicted for possessing the cocaine. Applying the *Blockburger* test, as construed by *Whalen* and *Harris*, the Court agreed that the cocaine charge was barred by double jeopardy. In so ruling, the Court rejected the government's contention that the *Blockburger* test should not bar the prosecution, because different interests were served by the contempt charge and the subsequent drug prosecution. The Court dismissed this attempted distinction out of hand: "[T]he distinction is of no moment for purposes of the Double Jeopardy Clause, the text of which looks to whether the *offenses* are the same, not the interests that the offenses violate." *Dixon*, 113 S.Ct. at 2858 (emphasis in original).

Accordingly, after *Dixon*, it matters not for purposes of the Double Jeopardy Clause that CCE, RICO and the Travel Act were enacted to further different Congressional goals. If the *Blockburger* test controls, then Kramer's RICO and Travel Act convictions in **KRAMER II** were barred by his prior CCE conviction in **KRAMER I**.

The logical application of *Dixon* to complex crimes such as RICO, CCE and the Travel Act means that *Dixon* has effectively overruled *Garrett v. United States*, 471 U.S. 773, 779, 105 S.Ct. 2407, 2411, 85 L.Ed.2d 764 (1985), as well as the body of lower court precedent authorizing RICO prosecutions following prosecutions for the predicate acts, including the Eleventh Circuit's decision at issue in this Petition. *See* Note, *United States v. Dixon: What Does "Same Offense" Really Mean?*,

48 ARK. L. REV. 709, 749 (1995) (recognizing that *Dixon*'s use of *Blockburger* test "may have a significant impact on the future of 'complex crime' prosecutions" under RICO and CCE and speculating that "lower courts may find it much more difficult to ignore" the lesser-included offense doctrine "than in the past").[1]

Since the *Blockburger* test now controls the Double Jeopardy analysis, legislative intent to permit successive punishments for both RICO and its predicate offenses "is of no moment." *Dixon*, 113 S.Ct. at 2858. This is so, the *Dixon* Court declared, because "congressional intent, no matter how clear, cannot bestow constitutional legitimacy upon multiple punishments for the same offense when they are imposed in multiple proceedings." *United States v. 9844 South Titan Court, Unit 9, Littleton, Colorado*, 75 F.3d at 1490. *See, e.g., Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 114 S.Ct. 1937, 1948, 128 L.Ed.2d 767 (1994) (finding "tax" imposed after drug conviction and forfeiture to constitute double jeopardy,

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[1] In *United States v. Phillips*, 664 F.2d 971 (5th Cir. Unit B 1981), *cert. denied*, 459 U.S. 906, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982), the court avoided the double jeopardy implications of successive CCE and RICO prosecutions by asserting that "'racketeering activity *in the abstract* does not necessarily involve a drug related activity.'" *Phillips*, 664 F.2d at 1010, n. 58 (emphasis added; citation omitted). *Dixon* teaches that viewing statutes entirely "in the abstract" is an incorrect analysis when determining whether successive prosecutions involve lesser-included offenses. Hence, it too has been overruled by *Dixon*.

regardless of congressional intent, holding that the tax "must be imposed during the first prosecution or not at all").

One aspect of the Court's decision in *Garrett* may still survive *Dixon* but is inapplicable to Kramer's situation. After approving successive prosecutions for predicate and CCE offenses on tl.e basis of legislative intent, *Garrett* held, in the alternative, that the Double Jeopardy Clause was not violated, in any event, because Garrett continued to engage in criminal conduct long *after* committing the drug offense upon which he based his Double Jeopardy claim. As the Court in *Garrett* colorfully put it: "One who insists that the music stop and the piper be paid at a particular point must at least have stopped dancing himself before he may seek such an accounting." *Garrett*, 471 U.S. 790, 105 S.Ct. at 2417 *See also United States v. Rodriguez-Aguirre*, 73 F.3d 1023 (10th Cir. 1996) (new CCE charge not barred by double jeopardy due to defendant's prior conviction for narcotics conspiracy where new indictment "specifically refers to a number of predicate drug offenses allegedly committed by Aguirre after the [first] indictment was returned").

This aspect of *Garrett* is inapplicable to Kramer for two reasons. *First*, Kramer's two indictments occurred within a few months of each other and the Florida indictment did *not* involve criminal activity which post-dated the Illinois indictment. Unlike the situation in *Garrett*, both the "music" and the "dancing ... stopped" when Kramer was arrested and preventively detained in **KRAMER I**. *Second*, as previously discussed, under general verdict principles, the Court must assume that

Kramer's convictions in **KRAMER I** and **KRAMER II** were based upon precisely the same predicate crimes, not temporally distinct crimes.

Even if the Court could somehow construe *Dixon* to permit congressional intent to have some bearing in the Double Jeopardy analysis, it would not assist the Court in determining whether RICO charges can properly be brought following a CCE conviction. Nowhere does the legislative history of RICO suggest that RICO charges should be brought in addition to (much less subsequent to) a CCE charge, as opposed to traditional drug offenses. Indeed, the CCE statute was not even in existence at the time RICO was enacted. The CCE statute was enacted on October 27, 1970 -- twelve days *after* RICO was passed. *See United States v. Turkette*, 632 F.2d 896, 902 (1st Cir. 1980), *rev'd*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981). Moreover, the original penalty for CCE was life imprisonment, while the maximum penalty for RICO has always been twenty years. Since CCE is and was the *more serious* of the two offenses, Congress would hardly have considered a RICO prosecution to be necessary following a successful CCE prosecution.

C. The Eleventh Circuit's Ruling Creates a Split In the Circuits Concerning the Application of the Double Jeopardy Clause In Complex Prosecutions

In light of *Dixon*, the Eleventh Circuit below should have utilized the *Blockburger* test, as applied to the specific charges (*see Dixon*, *Whalen* and *Harris*) at issue in **KRAMER I** and **KRAMER II**. It then should have barred Kramer's RICO and Travel Act convictions in **KRAMER II**. This Court should grant Kramer's Petition to review the Eleventh Circuit's ruling for two reasons.

First, the petition should be granted because the Eleventh Circuit's decision has decided an important question of federal law -- the proper construction of the Double Jeopardy Clause to complex crimes, such as RICO, CCE and the Travel Act -- which "conflicts with applicable decisions of this Court." *See* Supreme Court Rule 10.1(c). The Eleventh Circuit's decision conflicts with *Dixon* by woodenly applying *pre-Dixon* Double Jeopardy precedents to Kramer's case without regard to the impact of *Dixon*.

Second, the petition should be granted, pursuant to Supreme Court Rule 10.1(a), because the Eleventh Circuit's decision conflicts with other decisions of United States courts of appeal, including cases within the Eleventh Circuit itself. *See United States v. Calderone*, 982 F.2d 42 (2d Cir. 1992); *United States v. Reed*, 980 F.2d 1568 (11th Cir.), *cert. denied*, 509 U.S.

932, 113 S.Ct. 3063, 125 L.Ed.2d 745 (1993); and *United States v. Harvey*, 78 F.3d 501 (11th Cir. 1996).

In *Reed*, the defendant was first prosecuted for "lesser" offenses, drug conspiracies spanning the years 1978-1980. He was later prosecuted for engaging in the greater offense, a CCE conspiracy, spanning the years 1974-1989. Despite the longer duration of the subsequent charge, the Eleventh Circuit held that it was a violation of the Double Jeopardy Clause to prosecute Reed for the greater offense of CCE following a conviction of the lesser included offense of conspiracy. *Reed*, 980 F.2d at 1575-78. As the Eleventh Circuit explained, a conspiracy is a lesser included offense of a CCE charge because the "in concert" requirement of CCE has been interpreted to "encompass the agreement required to prove a [§ 846 or § 963] conspiracy." *Reed*, 980 F.2d at 1568, 1576 (citation omitted). The Eleventh Circuit correctly distinguished *Garrett*, recognizing that "*Garrett* did not address the issue of a CCE prosecution based on the predicate act of a drug *conspiracy*, an act similar to CCE, involving many of the same elements as CCE." *Id.* at 1575 (emphasis added).

The Eleventh Circuit reached the identical result earlier this year in *Harvey*. In 1983, Harvey was found guilty on stipulated facts of conspiracy to distribute marijuana in the Southern District of Florida. In 1990, he pled guilty in the Eastern District of Michigan to a cocaine conspiracy, part of which involved Florida. In 1991, he was indicted in the Middle District of Florida for having committed a CCE. He moved to

dismiss the new indictment on double jeopardy grounds, but his motion was denied, after an evidentiary hearing, in the district court and his interlocutory appeal was summarily rejected by the Eleventh Circuit. Following his trial and conviction, however, the Eleventh Circuit re-examined the evidence supporting the CCE charge and reversed, finding a double jeopardy violation because the CCE charge was predicated, in part, upon the Florida aspects of the 1990 Michigan case. Although the Eleventh Circuit did not discuss the impact of *Dixon* on *Garrett*, it correctly applied the *Blockburger* test without regard to any underlying legislative intent.

As in *Reed* and *Harvey*, Kramer's subsequent prosecution for the greater offenses (RICO and Travel Act) constituted a double jeopardy violation. The Eleventh Circuit's decisions at issue herein thus conflicts with both *Reed* and *Harvey*.

The Eleventh Circuit's decision also conflicts, at least implicitly, with the Second Circuit's decision in *United States v. Calderone*, 982 F.2d 42 (2d Cir. 1992). As previously discussed, CCE is considered a "conspiracy" type offense while RICO is considered a "substantive" offense. Hence, a substantive RICO charge might not always be barred by a prior CCE prosecution. *See generally United States v. Felix*, 503 U.S. 378, 112 S.Ct. 1377, 1385, 118 L.Ed.2d 25 (1992) (recognizing that there was no "ready transposition of the 'lesser included offense' principles of double jeopardy from the classically simple situation present in" single transaction crimes to offenses involving "multilayered conduct").

However, the distinction, if any, between the CCE "conspiracy" charge in **KRAMER I** and the RICO and Travel Act "substantive" charges in **KRAMER II** disappears due to the government's use of identical predicate offenses. As previously discussed, *Dixon* requires courts to analyze the nature of the actual charges pleaded, not the statutory offenses generally, to determine the double jeopardy consequences of a particular prosecution. Indeed, this Court in *Garrett* expressly assumed that a *substantive* importation offense and a CCE *conspiracy* charge were lesser and greater offenses. *Garrett*, 470 U.S. at 790. Since the RICO and Travel Act "substantive" charges in this case were based upon the same predicate offenses at issue in the CCE "conspiracy," they too were barred by double jeopardy.

A similar situation occurred in *United States v. Calderone*, 982 F.2d 42 (2d Cir. 1992). Calderone was originally indicted in the *Adamita* case for conspiring to import heroin from Europe into the United States and for distributing cocaine and marijuana between 1985-1988. At the conclusion of the government's case, the district court granted a Rule 29 motion for judgment of acquittal, indicating that the charges were too broad. *Calderone*, 982 F.2d at 43. The government sought to correct the problem by returning a second indictment which charged a more narrow conspiracy. *Id.* at 44. The new indictment, however, also included "substantive" offenses of using a telephone to facilitate the narcotics offenses under 21 U.S.C. § 843. *Id.* The Second Circuit ruled that *both* the new conspiracy

and substantive telephone charges were barred by Double Jeopardy. In extending its ruling to the telephone counts, the court recognized that *Felix* reiterated the "traditional rule that conspiracy and substantive offenses are different for purposes of double jeopardy." *Id.* at p. 48. Nonetheless, the court viewed the telephone counts as unique in that they alleged that the telephone was used to commit, among other things, the barred heroin conspiracy. *Id.* "Since we hold that the small conspiracy charged in Count One is the same offense, for jeopardy purposes, as the *Adamita* conspiracy, the Government cannot prosecute for a telephone substantive count by alleging use of the telephone to commit the very conspiracy prosecution of which, as a conspiracy, is barred." *Id.*

Under *Calderone*, the government in this case was barred from prosecuting Kramer for RICO and the Travel Act ("substantive" charges), as well as RICO conspiracy, if the RICO and Travel Act charges were based entirely upon the commission of other charges which the government could not still independently prosecute due to a Double Jeopardy bar. The government in this case plainly *was* barred from prosecuting Kramer separately for the predicate drug importations used to support the CCE charge in **KRAMER I** after convicting him of the CCE charge. Yet, these same predicates were utilized in **KRAMER II** to support the RICO and Travel Act charges. Hence, under *Calderone*, the RICO and Travel Act charges were barred by Double Jeopardy.

CONCLUSION

For all of the foregoing reasons, the petitioner respectfully requests that his Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was mailed this 15th day of October 1996 to: The Solicitor General, United States Department of Justice, 10th & Constitution Avenues, N.W., Washington, D.C. 20530; United States Department of Justice, Criminal Division, Appellate Section, P.O. Box 899, Ben Franklin Station, Washington, D.C. 20044-0899; and Robert J. Bondi, Assistant United States Attorney, United States Attorney's Office, 99 N.E. 4th Street, Miami, FL 33128.

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